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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOSE RAMON MARTINEZ-FABELA
and ISMAEL CORRAL,
Petitioners,

—against—

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment is violated when all cars traveling a major highway are stopped at a roadblock set up substantially at the unregulated discretion of the lowest level police officers operating in the field for the ostensible purpose of checking documentation and pursuant to the officers' training to use roadblocks for detection of drugs.

2. Whether the federal courts will continue to be allowed or encouraged to adhere to a "silver platter" doctrine by which evidence seized at roadblocks by state officers will be brought to federal courts which impose less stringent search and seizure standards on roadblocks than do the courts of the state in which the roadblocks are operated.

3. Whether a smell that indicates to an officer who is not experienced with the

smell of marijuana smoke that marijuana has been smoked in passenger compartment of the truck gives probable cause to search sealed containers buried under the cargo in the cargo compartment.

4. Whether a consent to search is valid when it is the product of the foregoing roadblock followed by an hour-and-a-half of detention that included 30 to 45 minutes on the side of the highway, interrogation, various searches that did not produce contraband, a 15 mile trip to the police station/jail, and retention by the police of one occupant's necessary documentation. More fundamentally this question involves the concept of whether an appellate court must consider such factors to determine whether an in-custody consent is tainted for fourth amendment purposes or whether, as here, the appellate court must defer to the

district court's unarticulated finding that the consent was "voluntary."

5. Whether, under the circumstances (principally a poor explanation of travel plans, to people carrying $1400 for a transcontinental trip, and an unprofessional packing job by non-professionals) there as reasonable suspicion or probable cause to detain petitioners.

6. Whether, in a case involving publicity, the emotional impact of a large drug haul, and potential national and ethnic bias, any special measures aside from a mention of publicity are required to insure an impartial jury.

7. Whether serious but unattributed, unsubstantiated, and unverifiable allegations may be used by the judge to prevent a defendant from presenting contentions

that his role in the criminal scheme was minor.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit, as reported at 823 F.2d 1329, is reproduced at page 1a of the Appendix to this Petition. The Court of Appeals' denial of rehearing is appended at 21a. The transcripts of the rulings of the U.S. District Court for the District of New Mexico are appended at 16a (fourth amendment issues), and 20a (sentencing issue).

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1987. Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc was denied on

January 6, 1988. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The fourth amendment of the Constitution of the United States, due process clause of the fifth amendment, impartial jury clause of the sixth amendment, Fed. R. Crim. P. 24(a) and 32(c)(3)(D), and 28 U.S.C. sec. 3577* are appended at 23a.

STATEMENT OF THE CASE

1. The Roadblock

Mr. Martinez, with Mr. Corral as a passenger, was driving a rental truck in the vicinity of Hobbs, New Mexico. (T 342, 352, 383) At about 4:30 in the af-

* This section was renumbered as 3661 without amendment to its language by the Sentencing Reform Act of 1984, effective November 1, 1987.

ternoon they were stopped at a roadblock that had been set up by New Mexico State Police Officers Norman Denton and Clifford Frisk. (T 334, 337)

Denton and Frisk had decided before coming on duty that they would have a roadblock. (T 333-34) Such roadblocks are set up largely at the discretion of these two junior officers (they had only been policemen for about four and one half months). (T 333-35, 362, 395-97, 423) The roadblocks are a "common occurrence. We do it just at random, no specific times . . . . [S]ometimes we have seven a week, sometimes we don't have any, just whenever we have time, we do it." (T 335) They average a "minimum of two a week". (Id.) The other officer described it as "We'll hold them at random if we don't have anything pressing to do, you know, we just contact each other

and decide to hold one. That's how we do it." (T 423)

There are no guidelines on when, where, or how to conduct a roadblock; the officers just inform their supervisor and do it. (Id.) The only constraint on when or where they hold a roadblock is that they have to notify their supervisor who always approves the roadblock if it does not require the officers to work overtime. (T 395) Permission is routinely given and never denied. (Id.)

The officers' practice was to stop all traffic except Furr's Supermarket trucks. (T 336) This decision as to what traffic to stop, like all other decisions except number of officers (more than one) and overtime, was left to the officers' discretion. (T 395, 397) There was no supervisory guidance, planning, or control over location, timing, lighting,

safety conditions, length of stop, nature and scope of investigation, further detention of motorists, maintaining traffic flow, warning approaching drivers, or any other factor bearing on the roadblock's intrusion into the lives of motorists. (Id., T 423)

The roadblock itself consisted of two patrol cars facing traffic, headlights on and emergency lights flashing, and a stop sign in the middle of the road. (T 336)

Since the roadblock is a product of contemporaneous decision of the officers on the road (T 334), there can be no advance dissemination of information about it. There was no evidence that the roadblocks effectively fulfill their stated purpose or whether other techniques would not be as effective.

This particular roadblock was said to have been set up primarily for the purpose of looking for traffic violations (driver's license, insurance, registration). (T 334) Drug detection, too, was high on the officers' priorities. (See T 424) Both of them had been trained to use roadblocks to detect drugs. (T 365-67, 424, Defendants' Exhibit B)

The officers claimed no non-drug-related roadblock training; even the seemingly non-drug-related admonition to "be polite" was only "because . . . we can't be sure they have stuff [i.e., drugs or other contraband]" (T 367)

An officer's testimony about their purpose and procedure included:

> Q Okay; are there any particular guidelines or anything that you use when you set up a ***roadblock to detect narcotics***?
>
> A No, sir. (T 424 emphasis added)

External indicia that New Mexico State Police officers are routinely using traffic and roadblock stops as pretexts to search for drugs were brought to the attention of the court. These include findings in two cases in the same District. The United States Attorney for the District has endorsed the use of traffic laws as a pretext for searching for drugs. (No. 69 Memorandum in Support of Motion to Suppress, filed 6/27/86)

The district court approved the roadblock because it was "at random" and traffic enforcement was "a purpose." (16a) The court of appeals approved it because it was for the sole purpose of traffic enforcement, with the "knowledge and consent of the officer's supervisor", and the fact that the officers chose to do it systematically protected the public

from these same officers' discretion. (9a)

2. The Smoke

When the truck stopped for the roadblock Officer Denton approached it first. (T 338) He says that he smelled marijuana smoke when the window was rolled down (T 338, 372, 390). It was extremely windy. (T 352) Officer Frisk never smelled it even though Denton told him it "reeked of dope." (T 342, 426-27) Denton could only recall two previous times that he had ever smelled burning marijuana. (T 361) These officers were not experienced in drug detection. (T 362-71, 422-23)

3. The Consent

The driver, Mr. Martinez, handed Officer Denton the requested documentation and his National Guard identification card, which had expired. (T 339) Mr. Martinez explained that they were on

their way to Atlanta with his sister's furniture and had to hurry in order to get back to El Paso where he was stationed. (T 341)

Denton "wanted to check and see if they had any more" marijuana, so he asked Martinez and the passenger, Corral, to get out. (T 342-43) He said the smell of the smoke made him think "they were either selling marijuana or some type of drugs." (T 348) He asked who had been smoking marijuana; Mr. Corral said that he had but that the one "roach" (marijuana cigarette butt) he had smoked was all he had. (Id.) No marijuana was ever found.

Officer Frisk asked Mr. Martinez "if he minded if we looked in the back of the truck and Mr. Martinez said something like go ahead . . . ." (T 342) Officer Denton, after ordering Mr. Corral out of

the truck, told him that his admission of marijuana smoking meant "that I would have to look inside of everything." (T 343) He asked Corral if he had been in trouble before, Corral acknowledged a prior arrest on a firearms charge, and he put Corral up against the side of the police car for a frisk. (Id.) This produced $429. (Id.) Denton asked Corral "if he minded if we went ahead and looked in the vehicle. He said, go ahead, no problem." (T 345) It is not clear whether Mr. Corral was still spread-eagled against the patrol car at this point. (T 343-46, 377)

Officer Frisk went to the back of the truck with Mr. Martinez and commenced to search. (T 346-47, 427-29) This was the area of the truck that Mr. Martinez had indicated the officers could look in. (T 342, 427-28) While Frisk was doing

this Denton, without any assent from Martinez, searched the driver/passenger area (as well as assisting Frisk in the cargo of the truck area); Frisk had already been into the front area. (T 348-52, 377, 429)

Officer Denton said that Officer Frisk ran an NCIC check on Mr. Corral during the time that Frisk was in and out of the front and back of the truck (T 347). Officer Frisk said it was only a drivers license check. (T 430)

While searching the front of the truck Officer Denton asked Mr. Corral if he could look in his suitcase. (T 348) The ensuing search of the suitcase produced $1,000. Without asking, he also searched Mr. Martinez' suitcase, finding nothing of note. (T 349) The officers considered the money to be a suspicious

circumstance calling for further investigation. (T 348-49, 378)

The back of the truck contained furniture - stove, refrigerator, couch, stack of mattresses - and cardboard U-Haul boxes. (T 349-50, 352, 429; depicted in Govt Exhs. 15, 16, 18, 19) The officers felt that having the couch at the end and the mattresses in a stack was "dumb" and "not a proper way to pack a truck." (T 349, 431) The boxes were on the floor of the truck bed; they were seen by lifting up the mattresses. (T 350-52, 429) Denton said he thought, because he had smelled marijuana smoke in the passenger compartment, the boxes under the mattresses in the cargo compartment might contain marijuana. (T 351) The compartments were separated by a sliding door. (Id.)

The officers decided that (1) the inconsistency between the expired National Guard identification and the claimed need to get back to the base, (2) the presence of the cash and (3) the unprofessional packing job required a more thorough search. Denton told Martinez he would like to search the truck further and gave him a choice:

> I gave - it was extremely windy on that day. I just told him that we could unload the van at that time right there on the road, or if - they were headed east, anyway, they were going right through Hobbs. . . . [W]e could just go into Hobbs and call the Hobbs Police Department, who has a drugs detecting dog . . . it would be a lot easier if we just went in there and let the dog sniff the truck out and they could be on

their way. And they agreed to that. (T 352)

To have unloaded there on the highway "would have been disastrous . . . . [I]t could have destroyed some of the property . . . . I'm [Denton] not real fond of lifting heavy stuff." (T 382)

By this time the defendants had been at the roadblock for about 30 (Denton) or 45 (Frisk) minutes. (T 380, 432) The trial judge would not allow evidence of whether they would have been free to leave if they had refused to consent to search. (T 382) The defendants drove the 15 miles into Hobbs, sandwiched between the two police cruisers. (T 353, 383, 432) The officers had given the defendants back most of their documentation, retaining, though, Mr. Corral's green card (immigrant's permanent residence permit). (T 432-33)

The officers took the defendants and the truck into a cement-walled compound at the police station/jail, parked it at the door for prisoners, and augmented their forces with several more policemen and a dog. (T 53, 355, 383, 432, 437) In short order they got a written consent to search from Mr. Martinez. (T 355, 435)

After this consent the "canine dog" (T 157) was, several times, sent around and throughout the truck with negative or inconclusive results. (T 357-59, 386-88, 437-39) As Officer Frisk said in reference to the dog's trying to get under the mattresses, "I'm no expert on dog behavior, so I don't know." (T 439) Although the trial judge said he was too busy to allow he testimony of the dog's handler, he accepted "as a proffer" that the handler would testify that the dog "hit" on at least three places where no drugs were

found. (T 439) There was no evidence of the dog's qualifications or the meaning of its actions.

The dog was removed after he led the officers to some money, the truck was totally unloaded, and the cardboard boxes were cut open. (T 359-60) The boxes contained over 400 pounds of cocaine. (T 360, 388, 436)

By this time the defendants had been with the officers for an hour-and-three-quarters. (T 100, 129-30, 154, 403) The written consent was obtained ten to fifteen minutes before the expiration of this time (T 158); that is, after about an hour-and-a-half. The defendants had never been told that they were free to leave.

The District Court upheld the search because the asserted marijuana smoke provided probable cause. (16a-17a) The

Court of Appeals agreed with this holding (13a) and apparently as an alternative basis, held that it must defer to the district court's finding that the consents to go to the police station and be searched were voluntary (11a-12a). Nothing in the record shows that the district court considered or decided this question.

4. Jury Selection

Before trial the defendants filed a motion that requested that special care be taken in selecting the jury because there had been extensive pretrial publicity (partially resulting from the unusually large amount of cocaine, T 18-19) and because of the possibility of ethnic or national bias against these two citizens of Mexico. (Motion for Effective Jury Selection filed 5/8/86) The suggested palliative was one or more of:

lawyer conducted voir dire, individual voir dire out of the presence of other jurors at least on publicity, voir dire in a relaxed atmosphere such as in chambers, use of voir dire questions that would require the prospective jurors to do more than simply remain silent to show assent, allow additional peremptory challenges, disclose official juror questionnaires well in advance of jury selection, order the government to share its information on the jury panel, and have the jurors fill out a special questionnaire. (Id. at 1-2) This motion was denied without hearing or opportunity to offer proof. (Order filed 5/23/86)

The problem was again raised by Corral during jury selection by requesting that the jury be queried on the effects on them of the large drug quantity and

the publicity. (T 18) The entire remedy granted and its result was:

> THE COURT: Ladies and gentlemen . . . perhaps you should be informed that there was some newspaper publicity regarding this particular case, announcing — allegedly asserting that there was a quantity of four hundred pounds of cocaine was involved.
>
> Now, is there anything about the quantity, or the fact that this matter received some report in the newspapers that there's any among you that feel you could not sit as a fair and impartial juror in this case?
>
> All right, fine, thank you.
>
> All right, ladies and gentlemen, as your names are called, would

you please take seats in the jury box . . . .(T 19)

Aside from this and from occupational and acquaintanceship information, the voir dire questions take only one page of the transcript and elicit no responses from the jury panel. (T 10-11; see defense requests, in Defendant's Requested Voir Dire, filed 5/30/86).

5. Sentencing

In the presentence report the government raised for the first time a claim that another large amount of cocaine had been seized from a car that was registered to a person that had used as an address a post office box rented by Mr. Martinez. Also, it raised a claim that a large amount of money had been seized from a house it claimed he had rented under an alias. (T 324) The source of these allegations does not appear in the

report. (Id.) The defense denied and moved to strike these unattributed accusations. (T 323-24) The motion was denied but the Judge initially said he would not consider the offending paragraph. (T 325) Then when counsel argued in mitigation that Mr. Martinez was impecunious and his participation in the crime was purely as a hired hand, the Judge apparently reversed his determination not to consider the unattributed accusations, saying "the information that you said I should not consider bears some weight, since he had . . . almost one and a half million dollars in the other apartment . . . ." (T 325-26) The information was either considered in rebuttal of defendant's argument or used to bar further presentation and any consideration of that argument. (T 326)

Counsel ceased the mitigation argument and Mr. Martinez was sentenced to 15 years, 5 more years than Mr. Corral had been sentenced to. (T 320,327)

REASONS FOR GRANTING THE WRIT

1. The Tenth Circuit's Policy of Allowing Roadblocks With Few Safeguards and Little Constraint on the Discretion of the Officer in the Field is Contrary to the Decisions of this Court and to the Overwhelming Trend of the Decisions of the State Appellate Courts

A. Conflict with Decisions of This Court

The idea that people can be stopped and detained by the police for questioning or other investigative purposes without the slightest hint of suspicion, either particularized against the person stopped or generalized against recent criminal activity in the vicinity,* is hard to reconcile with the fourth amendment and its jurisprudence. As the Chief

* Roadblocks to catch fleeing felons and escaped prisoners present special exigencies and so are not at issue here.

Justice wrote in Brown v. Texas, 443 U.S. 47, 52 (1979):

> Even assuming [crime is prevented] . . . to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it.

At least reasonable suspicion is needed to even make a brief stop, lasting usually less than a minute and consisting of a look and a couple of questions. United States v. Brignoni-Ponce, 422 U.S. 873, 882-83 (1975).

The year after that decision this Court began to sketch in the outlines of ways that the fourth amendment could allow wholesale vehicle stops. See United States v. Martinez-Fuerte, 428 U.S. 543

(1976). The Border Patrol was given a green light to use permanent checkpoints so long as they are near the border, on major highways, and for the purpose of a brief inspection to see whether illegal aliens were aboard. The apparent departure from usual fourth amendment ideas was bottomed on the government's evidence that the checkpoints (a) were effective in enforcing the immigration laws and (b) there were no alternative ways of reaching this result. The decision below validates roadblocks without consideration of either effectiveness or alternatives.

Even if need is established the character of the roadblock must still be circumscribed. Martinez-Fuerte noted that the checkpoints were permanent so "motorists using these highways are not taken by surprise as they know or may ob-

tain knowledge of, the location of the checkpoints and would not be stopped elsewhere . . .' 428 U.S. at 559. The officers had minimal discretion there as to whom to stop. This minimal discretion was further circumscribed by the fact that the location of the checkpoints was determined by superior officers. Id. None of these three factors is present here - motorists had no warning, the officers decided who to exempt, and they held the roadblock where and when they wanted to.

In Delaware v. Prouse, 440 U.S. 648 (1979) the Court moved away from the border and disallowed random stops conducted by officers in the field for license and registration checks. A major point against the stops was the officers' unfettered discretion. 440 U.S. at 661-

63. Having thus decided the case the Court went on:

> This holding does not preclude the . . . States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. 448 U.S. at 663 (footnote omitted, emphasis added)

Since then some lower court decisions have isolated the last sentence of this dictum from the language and the reasoning of the rest of the opinion to automatically validate any roadblock set up for license and registration purposes. But as the first of the quoted sentences makes clear, the dictum, like the hold-

ing, requires that the officers' discretion be constrained.

Here there were no constraints except administrative matters internal to the operation of the police department. Here we have two young police officers who, from their very first day on the job, felt that they had the discretion to go out and stop all passing motorists or select categories of passing motorists to look for "Just anything out of the ordinary." (T 367) In the four months that they were policemen they vigorously exercised this discretion to stop uncounted motorists in up to 40 roadblocks.*

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* This case may be a vehicle to answer the Washington Supreme Court's question in State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225, 227 (1985):

> From Prouse, therefore, we have a clear holding that this type of stop is invalid particularly because the efficiency of the "spot check" stop is not proven in the record. But, added to that, we have confusing dicta that asks us to believe that the stopping of all traf-

Martinez-Fuerte breaks the subjective nature of the intrusion into two areas: the degree of surprise and fright, and the discretion of the field officers. Prouse adds another factor, the extent to which the stop is in accord with traditional protected liberty and privacy interests. Martinez-Fuerte's stop passed muster on the surprise/fright score because of the permanence of the checkpoint. The opposite is true here. And of course, as thoroughly noted, the discretion of the officers on the scene here was total. When, as here, serious criminal law violations are being sought, it greatly escalates the fear factor over the minor criminal aspect of documentation checks. And the twice-a-week frequency of these officers' road-

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fic is somehow less intrusive to a particular motorist than the stopping of that motorist alone. The logic of this belief escapes us.

blocks in itself is a seriously intrusive circumstance. This is the situation not presented in Texas v. Brown, 460 U.S. 730 (1983) where there was no suggestion that a use of the roadblock was to find drug violations.

The only asserted constraint on the officers' discretion here vanishes upon examination. The officers merely had to radio in to their supervisor that they were holding a roadblock. But all police officers in the patrol cars always radio in to inform headquarters of what they're doing, so to rely on this as a constraint on discretion would validate all road-blocks.

These inexperienced officers were doing exactly what was condemned in Prouse, except on a larger scale. Here the officers said "We'll hold them at random if we don't have anything pressing

to do . . . ." (T 423) The district court endorsed this testimony with its finding that "The roadblock was random, at random . . . ." (T 443) The precise holding of Prouse, 440 U.S. at 661-63, was to invalidate random traffic stops by officers in the field. The concurring opinion explicitly links the validity of a roadblock to constraining the officers' discretion. 440 U.S. at 663-64 (Blackmun J., joined by Powell J.).

B. Conflicts With State Appellate Cases and the Silver Platter

A number of state courts have recently evaluated roadblocks with reference to the decisions of this Court cited in the preceding section. One writer, a state court trial judge deciding a case with a treatise-like opinion, found 28 recent state appellate court cases discussing roadblocks used for enforcing the drunk driving laws. Sitz v. Michigan

Dept. of State Police, No 86-613-063-CZ (Wayne Co. Mich. Cr. Ct. July 24, 1986). Only two of these were decided in a manner similar to the Tenth Circuit decision, that is, without analysis and with brief reference to the Prouse dictum on stopping all motorists. The other 26 undertake a more detailed analysis that, in all cases, puts weight (ranging from major to total) on the need for curbing the field officers' discretion. It appears that at least 11 of the cases* make the presence or absence of supervisory guidelines dispositive. Others rely on factors promulgated in State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983)*

* E.g., State v. Hillesheim, 291 N.W.2d 314, 318 (Iowa 1980)(predetermination of time and place by policy making officers);. Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E. 2d 349 (1983)(plan devised by supervisory personnel);

* "(1) The degree of discretion, if any, left to the officer in the field; (2) the

Again, the factors focus mostly on the adequacy of the guidelines which of course are non-existent here. Another 11 cases* use a three-part balancing test among (1) the state interest involved (2) the effectiveness and (3) the degree of

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location designated for the roadblock; (3) the time and duration of the roadblock (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) the degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test." 673 P.2d at 1185.

* E.g., State ex rel. Ekstrom v. Justice Court, 136 Ariz. 1, 663 P.2d 992 (1983)(too much discretion, guidelines not detailed enough, no notice to public); State v. Smith, 674 P.2d 562 (Okla. Crim. App. 1984)(likens roadblocks to hypothetical "police state" tactic of checkpoints at shopping centers to check for shoplifters).

intrusion i.e., the Martinez-Fuerte/Brown v Texas analysis.**

The state court trend in opposition to the lower federal court decisions appears to be gaining momentum. Recently Oregon and California have weighed in strongly on the side of carefully circumscribing the field officers' discretion. See Ingersoll v. Palmer, 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987)*;

** This is also the approach taken in .E. Ringel, Searches & Seizures, Arrests and Confessions, sec. 11.6(c)(2d ed. 1986). He, too, concludes that the courts simply won't sustain a roadblock such as this one where the field officers' discretion is not carefully circumscribed. See particularly id. at 11-39 n.792.

* The case upheld the validity of the carefully controlled and supervised roadblock at issue there. Apparently because of this the case has been cited by the Associated Press as a leading example of the California Supreme Court's "turn to the right" and "rightward drift." See Associated Press dispatch published, for example, in Albuquerque Journal, Feb. 14, 1988 at B-10. The standardless and largely discretionary roadblock held here would not come close to passing this "rightist" test.

Nelson v. Lane County, 304 Ore. 97, 743 P.2d 692, 699-700, 708 (1987), aff'g 79 Ore. App. 753, 720 P.2d 1291 (1986)(supervising officer controlled by detailed regulations). As these cases demonstrate, the battle in the state courts has been on whether roadblocks will be allowed at all, rather than over what controls will be exercised. This question is of course included within the questions presented here and will be briefed if certiorari is granted.

New Mexico, where this roadblock occurred, is no exception to the overwhelming trend in the state courts. The Court of Appeals here declined to mention City of Las Cruces v. Betancourt, 105 N.M. 655, 735 P.2d 1161, (Ct. App.), cert denied, 105 N.M. 618, 735 P.2d 535 (1987). That decision cited a number of the state decisions and decisions from

this Court to explicitly adopt a multi-factor requirement* that would apparently invalidate the use of any evidence seized at the roadblock at issue here.

All of this is reminiscent of the "silver platter" situation abolished by Elkins v. United States, 364 U.S. 206 (1960). Although technically distinguishable from the pre-Elkins situation, the fundamentals appear the same. Roadblock stops will continue to produce contraband. Almost all roadblocks are conducted by state officers. What is contraband under state law is usually contraband under federal law. Under the present state of affairs it appears that

* "We agree with the Ingersoll court that . . . the selection of the site and procedures for conducting it must be made and established by supervisory law enforcement personnel rather than officers in the field." 105 N.M. at 658. The other factors are similarly consistent with those in the mainstream state court cases.

the prosecutors will, in selecting the forum, select the federal court for the unseemly reason that it will apply the fourth amendment of the Constitution of the United States* less rigorously. The overall effect of the shifting of this contraband caseload to the federal courts will exacerbate the perception that the federal law has already moved too far toward taking over the historic criminal justice domain of the states. In any event this case presents an opportunity to harmonize state and federal fourth amendment decisions.

2. To Say That Unverified Marijuana Smoke in the Cab of A Truck is Probable Cause to Search the Cargo Compartment Violates United States v. Ross, 456 U.S. 798 (1982)

While this case was pending before argument the Court of Appeals decided in

* Although a few of the state court cases mention their state's analog to the fourth amendment, the overwhelming factor in the decisions is the fourth amendment.

United States v. Loucks, 806 F.2d 208, 209 (10th Cir. 1986) that when an officer experienced with marijuana arrests smells marijuana smoke in a car, this provides probable cause to search the trunk. Then in this case Loucks was extended to the inexperienced officer as the Court ruled "It is beyond cavil that the [Officers] . . . had probable cause to search the truck." (13a) The search was of sealed cardboard boxes under a load of furniture in the cargo compartment. But:

> The scope of a warrantless search of an automobile . . . . is defined by the object of the search and the place in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs

> bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband . . . does not justify a search of the entire cab. United States v. Ross, 456 U.S. 798, 824 (1982) (emphasis added).

Most of the cases on the smell of marijuana as probable cause share several features: (1) The smell was of the raw plant, usually in bulk amounts. (2) The search produced the contraband in a place the smell could reasonably be thought to be emanating from. (3) The smelling officer was experienced and expert in recognizing the smell.

The title of professor LaFave's chapter on this subject neatly states the requirement: "Nexus Between Crime, Objects and Place" 1 W. LaFave, Search and Seizure, sec. 3.7d at 704 (1978). State and lower court cases that apply the Ross and nexus requirement to suggest that the probable cause given by marijuana smoke does not extend beyond the probable source of that smoke include Garrett v. Goodwin, 569 F. Supp. 106, 120 (E.D. Ark. 1982); Burkett v. State, 271 Ark. 150, 607 S.W.2d 399 (1980); State v. Fuksman, 490 So. 2d 1067 (Fla. App. 1985); Wimberly v. Superior Court, 16 Cal. 3d 557, 128 Cal Rptr. 641, 547 P.2d 417 (1976); State v. Walker, 93 N.M. 769, 605 P.2d 168, 170 (Ct. App. 1980) (concession by state).

3. The Tenth Circuit Explicitly Reject
The Decisions of Other Circuits the Echo
This Court's Requirement That "Voluntary
Consents Be Examined for Fourth Amendmen
Taint

A.. Apparent Voluntariness vs.
Fourth Amendment Taint

It is not reasonably subject to dis-
pute that the progeny of Wong Sun v.
United States, 371 U.S. 471, 488 (1963)
hold that, regardless of the apparent
"voluntariness" of a consent to search,
fourth amendment analysis is necessary t
see whether any asserted fourth amendmen
violation may have nevertheless tainted
the consent.* See, e.g., Florida v.
Royer, 460 U.S. 491, 508 (1983); Taylor
v. Alabama, 457 U.S. 687, 690 (1982);
Brown v. Illinois, 422 U.S. 590, 604
(1975). It is equally clear that the
Tenth Circuit has rejected this doctrine

* The cases, e.g., Florida v. Royer, 460
U.S. 491, 501 (1983), do not distinguish
between consents and confessions for thi
fourth amendment analysis.

This rejection was most thoroughly articulated in United States v. Carson, 793 F.2d 1141 (10th Cir.), cert. denied, 107 S. Ct. 315 (1986) and continues in the present case in that there is here no discussion of anything but apparent voluntariness.

The Tenth Circuit throws down the gauntlet at the outset of the Carson decision. It reports that United States v. Melendez-Gonzalez, 727 F.2d 407 (5th Cir. 1984) is incorrect and will not be followed because "the decisions of one circuit court of appeals are not binding upon another circuit." 793 F.2d at 1147.

Carson, like the decision here, melds the fourth amendment taint analysis into apparent voluntariness by complaining that this Court has not defined the Wong Sun terms, and then describing Wong Sun's holding as follows: "[D]efendant's

consent to a search so long as it is voluntary in fact, constitutes a sufficiently independent act to purge the evidence of the taint of prior illegal Government conduct." 793 F.2d at 1156 (emphasis in original).

This conclusion is at odds with the analysis required by Brown v. Illinois, 422 U.S. 590 (1975) and Dunaway v. New York, 442 U.S. 200 (1978) when evaluating a confession or consent following an illegal arrest. As stated in Brown the factors are the (1) temporal proximity between seizure and consent, (2) any intervening circumstances, and (3) the purpose, and flagrancy of the official misconduct. The consent here certainly fails the first two factors and fails the third if one accepts the contraband related purpose of the roadblock.

In a curious circularity, the Carson opinion starts by postulating that apparently voluntary consent purges any illegality, 793 F.2d at 1147-48, repeats the postulate several times in discussing Wong Sun, Brown, and Dunaway, and then restates it in the form quoted above as its conclusion. Somehow, despite lengthy discussion, the Brown factors seem never to make it into the holding. As a result, and as suggested by the Carson dissent, 793 F.2d at 1158, in our case the Brown factors are ignored entirely in the exclusive focus is on the dictionary definition of "voluntary."

The Tenth Circuit's results explicitly differ from those of the Fifth and Eleventh Circuits. The opinions in United States v. Robinson, 625 F.2d 1211 (5th Cir. 1980), appeal after remand, 690 F.2d 869 (11th Cir. 1982). In that case,

the district court found that the defendant voluntarily consented to a search after being warned that he did not have to consent. The Fifth Circuit remanded the case for consideration of whether the consent was the product of the illegal detention and held after remand that, "[t]he cocaine . . . must be suppressed as the tainted fruit of the illegal arrest unless Robinson's consent to the search in the airport office was both (1) voluntary, and (2) not the product of the illegal detention." 690 F.2d at 877. Item (2) is not a factor in the Tenth Circuit.

Robinson and Carson do agree that the courts could use more guidance from this Court. Carson's questions about Wong Sun definitions have been noted above, and Robinson refers to the "lingering confusion between

'voluntariness' . . . and the 'causal connection' test established in Brown," 625 F.2d at 1220. Here, eight years later, the confusion still lingers. Others have noted that "the Brown opinion failed to set forth clear standards . . ." and its factors "are subject to misconstruction . . ." Note, 25 Emory L.J. 227, 239, 240 (1976).

B. Threshold vs. Whole Inquiry

Again, the Tenth and Fifth Circuits are at odds: "[V]oluntariness is merely a threshold requirement" United States v. Robinson, 625 F.2d 1211, 1220 (5th Cir. 1980). Accord: United States v. Melendez-Gonzalez, 727 F.2d 407 (5th Cir. 1984). But in the Tenth Circuit "[V]oluntariness is not a 'threshold requirement'; it is the sole constitutional requirement . . . United States v. Carson, 793 F.2d 1141, 1151 (10th Cir.),

cert denied, 107 S.Ct. 315 (1986) "We reject the Fifth Circuit's analysis in Melendez-Gonzalez . . ." 793 F.2d at 1153.

C. Heavy Burden vs. Business as Usual

The conflict continues: To validate a consent after an illegal rather than legal stop, "the government has a much heavier burden . . ." United States v. Melendez-Gonzalez, 727 F.2d 407, 414 (5th Cir. 1984)*. Carson quotes this and rejects it. 793 F.2d at 1153. And, again, the result in our case is to validate the consent with a cursory reference to voluntariness. (12a-13a)

D. The Detention was Illegal

* United States v. Mayes, 552 F.2d 732 (6th Cir. 1977); Hayes v. Cady, 500 F.2d 1212 (7th Cir.), cert denied, 419 U.S. 1058 (1974); United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973).

There is, of course, no doubt that defendants' detention was a seizure in the fourth amendment sense. That the seizure of Mr. Martinez (he was the one who gave the critical consent; he was not the one smoking the marijuana) was illegal seems clear under such cases as Hayes v. Florida, 470 U.S. 811 (1985); United States v. Sharpe, 470 U.S. 675 (1985) and Reid v. Georgia, 448 U.S. 438 (1980).

The Hobson's choice of either having the defendants unload all of their furniture on the windy highway where it would surely be damaged or be blown away or go to the jail should have brought the situation under Hayes. The hour-and-a-half of detention preceding the consent was not compared with Sharpe.

Prior holdings of the Tenth Circuit had carefully considered whether Hayes, Sharpe, and Brown/Dunaway required

suppression. These Tenth Circuit cases were effectively overruled here (13a) and by United States v. Lopez, 777 F. 2d 543, 550 (10th Cir. 1985), both cases using the device of saying that the earlier cases are "limited to their facts."

E. The Standard of Review

The Tenth Circuit rejects the practice of this Court by applying the "clearly erroneous" standard to its determination of voluntariness. Compare the full factual analysis of cases such as Brown and Sharpe Florida v. Royer, 460 U.S. 491 (1983) gives no deference to the trial court's finding of voluntariness.

Here the Court of Appeals' review of the validity of the consent was largely limited to its conclusion that "the district court's finding that appellants voluntarily consented to accompany the officers and to the subsequent searches

was not clearly erroneous." (12a) The court cites two of its prior cases for the proposition that this is the standard of review and that the evidence must be viewed in the light most favorable to the District Court's finding.

To apply this standard to constitutional questions will inevitably mean that litigants will not always receive appellate consideration of their constitutional issues. The proof of that assertion is this very case, for here the district court did not even make the finding that the court of appeals is claiming deference to.

4. The Tenth Circuit Declined to Follow the Rule of Other Courts on Questioning Jurors on the Publicity

In United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981) and United States v. Davis, 583 F.2d 190 (5th Cir. 1978) it was held that, particularly

where large amounts of drugs are charged, it was inadequate for the Court to only inquire "of the panel in en masse whether any member thought that the publicity impaired their ability to render an impartial decision," 658 F.2d at 283. To the extent that the question used here was not too ambiguous for any intelligible answer, was the same as the question held inadequate in the Fifth Circuit. Here, too, the question was asked of the panel en masse The court here declined to follow or even acknowledge the Fifth Circuit's decisions.

Cases from other circuits to the same effect as the cited Fifth Circuit cases, and accordingly at odds with this case, include Patriarca v. United States, 402 F.2d 314, 318 (1st Cir. 1968), cert denied, 393 U.S. 1022 (1969); United States v. Addonizio, 451 F.2d 49, 67 (3rd

Cir.), cert denied, 405 U.S. 936 (1972)(adopting ABA Standards Relating to Fair Trial and Free Press, sec. 3.4(a)); United States v. Blanton, 719 F.2d 815, 822 (6th Cir. 1983); United States v. Bear Runner, 502 F.2d 908, 912 (8th Cir. 1974); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968). A more extensive collection of authorities and analysis appears in Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985).

5. Due Process, as Applied by This Court and Other Circuits, Does Not Allow Use of Unattributed, Unsubstantiated, and Unverifiable Allegations at Sentencing

The trial judge, by conditioning his purported non-consideration of the objectionable matter on defendant Martinez' not presenting his mitigation evidence violated the principal tenet of Townsend v. Burke, 334 U.S. 736, 744 (1948). Townsend makes it a due process violation to base the sentence on erroneous

information. Other circuits have applied Townsend to hold that there must be at least some minimal indicia of reliability or verifiability to the information used at sentencing. See United States v. Baylin, 696 F.2d 1030, 1040 (3rd Cir. 1982) ("some minimal indicium of reliability"); United States v. Weston, 448 F.2d 626, 630-34 (9th Cir. 1971), cert denied, 404 U.S. 1061 (1972)("must have some concern for the probable accuracy of the informational inputs"). The split between the circuits on this aspect of the issue, then, is clear.

A different approach to the same result would apply cases such as Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) to allow presentation of the mitigating evidence without burdening it with the unconstitutional condition.

Respectfully Submitted,

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UNITED STATES of America, Appellee,

v.

Ismael France CORRAL, Appellant.

UNITED STATES of America, Appellee,

v.

Jose Ramon
MARTINEZ-FABELA, Appellant.

Nos. 86-2361, 86-2362.

United States Court of Appeals,
Tenth Circuit.

July 13, 1987.

Robert Ramos, El Paso, Tex., for appellant Corral.

Reber Boult, Albuquerque, N.M. (Timothy M. Padilla, Albuquerque, N.M., with him on brief), for appellant Martinez-Fabela.

James D. Tierney, Asst. U.S. Atty., Albuquerque, N.M. (William L. Lutz, U.S. Atty., and Larry Gomez, Asst. U.S. Atty., Albuquerque, N.M., with him on brief), for appellee.

Before HOLLOWAY, Chief Judge,
and ANDERSON and TIMBERS,*
Circuit Judges.

TIMBERS, Circuit Judge.

Jose R. Martinez-Fabela ("Martinez") and Ismael F. Corral ("Corral") appeal from judgments of conviction entered September 2, 1986 in the District of New Mexico, Juan G. Burciaga, *District Judge*, following a jury trial. Martinez and Corral were found guilty of possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) (1982) and 18 U.S.C. § 2 (1982).

Prior to trial, Martinez and Corral made a motion to suppress evidence seized during a consensual search of the rented truck they were driving. They mounted a multi-prong attack, challenging, first, the constitutionality of the roadblock at which they were stopped by the New Mexico State Police; second, the propriety of their detention after the initial stop; and, third, the validity of the consents they both gave to search the truck and their personal effects. After a hearing, the district court denied the motions to suppress. On appeal, Martinez and Corral argue that the denial of their motions was clearly erroneous. We disagree.

We hold that the roadblock in the instant case comported with established law in this Circuit. The roadblock was put in place to check vehicle registrations, driver's licenses and proof of insurance—all legitimate and permissible reasons. We also hold that the detention of Martinez and Corral, following the initial stop at the roadblock, was reasonable within the meaning of *Terry v. Ohio*, 392 U.S. 1 (1968). Finally, we hold that appellants' consents to accompany the

officers from the roadblock to the local police department, and to the subsequent searches, were voluntary and not the product of police overreaching, coercion or duress.

Martinez also contends that the procedures employed in sentencing him were flawed by consideration of false and unreliable information contained in the pre-sentence report prepared on him.[1] We disagree. The court below determined on the record that it placed no reliance on the challenged portions of one report in imposing sentence. We accept this determination. We do remand this matter, however, with directions that the trial court cause its determination that it would not consider the challenged statements in imposing sentence to be appended, by written order to the pre-sentence report for the information of any persons examining the pre-sentence report. *See* Fed.R.Crim.P. 32(c)(3)(D).

We affirm the judgments of conviction in all respects. As to appellant Martinez' challenge to his sentencing procedure, we remand for the limited purpose delineated herein.

1. Martinez also contends that the court erred in denying his pre-trial discovery motions; and that the voir dire by the court in selecting the jury was insufficient to insure a fair trial. Corral argues that the evidence was insufficient to sustain his conviction. We have carefully considered these claims of error and we hold that they are without merit.

I.

We summarize only those facts believed necessary to an understanding of the issues raised on appeal.

On April 17, 1986 Martinez was driving, with Corral his passenger, a rented Ryder truck eastbound on New Mexico State Road 62/180 when they were stopped at a roadblock set up by the New Mexico State Police near Hobbs, New Mexico. The roadblock had been established by State Police Officers Denton and Frisk, pursuant to their supervisor's permission, to conduct routine driver's license and car registration checks. The plan implemented by the officers with the roadblock was to stop all eastbound traffic, with the exception of a local supermarket's delivery trucks. The latter trucks were excluded from the roadblock because the officers, who had often stopped such trucks at previous roadblocks, knew all the drivers and knew that their logbooks, cab cards and insurance were current.

After the Ryder truck stopped, Officer Denton approached it. As Martinez rolled down the window, the officer detected a strong odor of marijuana emanating from the truck. The officer requested that Martinez produce his driver's license and the

truck rental agreement. Martinez complied. In addition, he offered the officer an expired National Guard identification card. Martinez explained to the officer that he

and Corral were on their way to Atlanta to deliver to Martinez' sister the furniture in the truck. Martinez stated that the trip was to be a hurried one because he was stationed in El Paso and had to return to that locale. Denton found this statement to be inconsistent with his expired National Guard identification card.

In view of his detection of the odor of marijuana, Denton asked Martinez to pull the truck over to the side of the road. Martinez and Corral thereupon got out of the truck. At that time Officer Frisk joined them. After being informed by Denton why he had asked Martinez to pull the truck over to the side of the road, Frisk asked Martinez for permission to look in the cargo compartment of the truck. Martinez responded in the affirmative. Frisk began a limited search. He noticed that the truck was loaded with furniture and cardboard U-Haul boxes which were taped shut. There also were several mattresses stacked on top of the cardboard boxes.

While the conversation between Frisk and Martinez was taking place, Denton walked around the truck to the passenger side. He asked Corral who had been smoking the marijuana. Corral admitted that he had been smoking it, but insisted that he already had smoked the only joint in his possession. Denton asked Corral directly if he had in his possession any more marijuana, to which Corral responded in the negative. Denton informed Corral that, since he had admitted smoking an illegal substance, Denton would "have to look inside of everything." Denton next asked Corral if he had ever "been in trouble"

before. Corral responded that he once had been charged with a firearms violation in Chicago. Denton then decided, for his own safety, to frisk Corral. A pat down of Corral resulted in the discovery of $429 in currency. Corral then gave Denton his full name and birthdate. Denton gave this information to Frisk who went to his police car to radio in a request that a check on Corral be made through the National Crime Information Center ("NCIC").

Denton then asked Corral for permission to look further inside the truck and to look inside his suitcase. Corral gave his permission to do so. The search of the suitcase disclosed $1,000 in $20 bills.

Denton next opened the sliding door between the truck cab and the cargo compartment. He saw the furniture and the mattresses stacked on the sealed cardboard boxes. The officers then consulted with each other. In view of the amount of currency found in Corral's suitcase and on his person, together with what the officers believed was a curiously improper way to pack the cargo compartment, they decided to seek permission to search the truck more thoroughly. According to Denton's trial testimony, he spoke with appellants as follows:

> "I gave—it was extremely windy on that day. I just told him [Martinez] that we could unload the van at that time right there on the road, or if—they were headed east anyway, they were going right through Hobbs. At that time, I told them that if they would rather, we could just go into Hobbs and call the Hobbs Police Department, who has a drugs de-

tecting dog, that's trained to detect drugs, if they wanted to, it would be alot easier if we just went in there and let the dog sniff the truck out and they could be on their way.... The option I gave him [Martinez], we could unload it there where the wind was blowing and it would have been—to me, it would have been disastrous. You know, it could have destroyed some of the property that was there."

Appellants agreed to accompany the officers to Hobbs. Following Denton, they drove into the town. Upon arrival at the Hobbs Police Department, the officers instructed Martinez to pull the truck into a fenced-in area behind the police station, out of the wind. There they were met by several officers of the Hobbs Police Department and "Buster", the dog trained in drug detection. Denton then requested Martinez to sign a written consent-to-search

form, to augment his earlier oral consent. Following a discussion of the form, Martinez read it twice and signed it.

Once the written form had been signed, Denton instructed Officer Randolph of the Hobbs Police Department to let "Buster" into the truck. According to the trial testimony, each time the dog entered the truck he attempted to get underneath the couch and mattresses to the cardboard boxes. The officers opened the boxes and discovered approximately 474 pounds of cocaine. Martinez and Corral were arrested immediately.

On April 14, 1986 a federal grand jury returned a one count indictment charging appellants with one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) (1982) and 18 U.S.C. § 2 (1982). On June 27, 1986 an evidentiary hearing was held on defense motions to suppress. Following the hearing, the motions were denied.

The case was tried before a jury on July 15 and 16, 1986. Appellants were found guilty as charged in the indictment. On August 29, 1986 Corral was sentenced to a ten year prison term and Martinez was sentenced to a fifteen year prison term. This appeal followed. We consolidated the appeals for purposes of oral argument and this opinion.

For the reasons set forth below, we affirm the convictions in all respects, with the exception of the limited remand for the purpose of appending a written order of determination to appellant Martinez' presentence investigation report.

II.

A. *Constitutionality*

[1] Appellants argue that the roadblock set up by the New Mexico State Police was unconstitutional under prevailing Fourth Amendment standards. They assert that the roadblock was not established for the stated purpose of checking driver's licenses, vehicle registrations and proof of insurance; rather, they claim that the roadblock was a pretext for stopping them. A thorough review of the record leaves us with

the firm conviction that that argument, cloaked in cursory allegations, is without merit.

We have upheld many times the constitutionality of roadblocks currently in use by the New Mexico State Police. *E.g., United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985); *United States v. Obregon*, 748 F.2d 1371 (10th Cir.1984); *United States v. Prichard*, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981). We uphold the constitutionality of the roadblock involved here.

The purpose of the roadblock set up by Officers Denton and Frisk was to check driver's licenses, vehicle registrations and proof of insurance. This was a permissible and lawful purpose. The roadblock was set up with the knowledge and consent of the officers' supervisor. It did not involve a single, random or selective stop chosen at the officers' discretion. *Cf. Delaware v. Prouse*, 440 U.S. 648 (1979). Rather, the roadblock as implemented consisted of the stopping of every vehicle heading east on State Road 62/180 with the exception of the local supermarket delivery trucks which were permitted to pass uninspected for articulated and legitimate reasons. Hence, this roadblock was established in a systematic manner to stop vehicles in a pattern which protected the public from the officers' unbridled discretion.

We hold that the roadblock passed constitutional muster.

B. *Propriety of the Detention and Searches*

We turn next to appellants' contention that their detention was an unreasonable seizure and that the consents given by them with respect to the subsequent searches were tainted. Our analysis is bifurcated into two segments: first, the initial detention; and, second, the search at the Hobbs Police Station.

1. *The Initial Detention*

[2] The Supreme Court has enunciated a two-prong inquiry for evaluating the reasonableness of police-citizen encounters which, although somewhat intrusive, fall

short of full scale arrest. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court set forth the standard which a reviewing court must apply when examining police action. We must inquire

> "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."

Terry, supra, 392 U.S. at 23. In the instant case, having made this inquiry, we answer it in the affirmative and hold that appellants were detained lawfully after being initially stopped at the roadblock. *Accord, United States v. Obregon*, 748 F.2d 1371 (10th Cir.1984).

Officers Denton and Frisk had reasonable and articulable suspicion that the individuals might be involved in violation of the narcotics laws when Officer Denton recognized the odor of marijuana emanating from the vehicle after Martinez rolled down the window. This suspicion was confirmed when Corral admitted that he had smoked marijuana. Further, when Corral informed Denton that he had been charged at an earlier date with a firearms violation, the officers were amply justified in running the NCIC check to determine if Corral was a fugitive. "Consequently, in order to run an NCIC check while minimizing the danger to the defendants and to travelers approaching the roadblock, the officers acted reasonably in requesting [Martinez] to park on the shoulder of the road." *United States v. Lopez*, 777 F.2d 543, 548 (10th Cir.1985).

We hold that the subsequent detention of appellants comported with the reasonableness requirement of *Terry*.

2. *The Search*

[3] Appellants contend that the district court erred in finding that they validly consented to accompany Officers Frisk and Denton to the Hobbs Police Department. The standard of review of such a claim was set forth in *United States v. Lopez, supra*, 777 F.2d at 548: "In reviewing a denial of a motion to suppress, the trial court's finding of fact must be accepted by this court

unless clearly erroneous, *United States v. Cooper*, 733 F.2d 1360, 1364 (10th Cir. 1984), with the evidence viewed in the light most favorable to the district court's finding.. *United States v. Obregon*, 748 F.2d 1371, 1376 (10th Cir.1984)." We conclude the district court's finding that appellants voluntarily consented to accompany the officers and to the subsequent searches was not clearly erroneous.

It is axiomatic that a consent to search is valid if voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-226 (1973). Further, consent to search is voluntary if it is not the product of duress or coercion. *Id.* at 227. The record before us is barren of any such negative behavior on the part of the officers involved. In response to the initial request by Officer Frisk, Martinez agreed to the search at the roadside. Corral responded to a similar request by Officer Denton by assuring him that he could "go ahead—no problem". Both Martinez and Corral stood by observing the search. Neither made any requests of the officers to stop. After cursory examination, the officers decided that a more thorough examination of the truck was called for. They gave Martinez and Corral the option of having the truck searched at the roadside or at the Hobbs Police Department, where the truck would be searched by a drug-detecting dog. The option was a sensible one. The testimony was that the weather on the highway that day was inclement. The task of unloading all of the furniture on the side of the road would have been unwieldy at best. At worst, it would have created a situation highly dangerous to the four individuals in particular

and the driving population in general. After consideration, Martinez and Corral decided to accompany the officers to Hobbs. They knew the reason for the additional search and that the officers would be aided by a drug-detecting dog. We decline to relieve appellants of their voluntary choice at this late date.

Appellants argue that our holdings in *United States v. Gonzalez*, 763 F.2d 1127 (10th Cir.1985), and *United States v. Recalde*, 761 F.2d 1448 (10th Cir.1985), re-

quire reversal of their convictions. We disagree. In those cases, which are limited to their facts, we held that probable cause to remove the defendants from the highway to a local police department was non-existent. As a result, the consents to do so were held to have been rendered involuntary and beyond the scope of a permissible *Terry* stop. In the instant case, however, it is beyond cavil that Officers Frisk and Denton had probable cause to search the truck. The odor of marijuana struck Officer Denton as soon as Martinez opened the window. Corral confirmed the use of the illegal substance by admitting that he had smoked it. Added to this was the unusual manner in which the truck was packed, in conjunction with the large amount of currency found in Corral's suitcase. Evaluating these circumstances as they appeared to these prudent, cautious and trained police officers, *United States v. McCormick*, 468 F.2d 68, 73 (10th Cir.1972), *cert. denied*, 410 U.S. 927 (1973), we are satisfied that they were circumstances which would cause the officers reasonably to believe that a crime was being committed.

We hold that the district court was not clearly erroneous in denying the motions to suppress.

III.

[4] Martinez argues that the district court committed reversible error in considering certain challenged allegations in his pre-sentence report when it imposed sentence on him. Based on this he invites us to remand the case for, inter alia, a new sentencing. We decline the invitation.

Fed.R.Crim.P. 32(c)(3)(D) requires that if a defendant alleges any factual inaccuracy in the pre-sentence investigation report the court could "make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing." In the instant case, Martinez challenged certain allegations contained in the pre-sentence report that he possessed substantial amounts of cocaine and large amounts of money found at an apartment allegedly rented by him under an alias. In response to this challenge the court below stated on the record that it was not considering those allegations in imposing sentence. We accept the trial court's determination.

We note, however, that total compliance with Rule 32(c)(3)(D) was not achieved with this oral pronouncement. The rule contains an additional requirement. It is mandatory when it states that the court *shall* cause a written record of its determination to be appended to and accompany any copy of the pre-sentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission. It is

beyond cavil that these administrative agencies make substantial use of the pre-sentence investigation report. Justice requires that any challenges to the accuracy of that report, and the judicial resolution as to the controverted matters, be brought to the attention of these agencies when they utilize the report.

We therefore remand with directions that the trial court cause its determination that it did not consider the challenged allegations in imposing sentence to be appended, in a written order, to the pre-sentence investigation report.

IV.

To summarize:

After considering in detail each of appellants' claims of error, we conclude that the judgments of conviction must be affirmed. We hold that the roadblock, as implemented by Officers Frisk and Denton, fully comported with Fourth Amendment standards. We also hold that the detention of appellants after the initial roadblock stop was acceptable under the rationale of *Terry*. We further hold that the evidence is plainly adequate to support the district court's finding that Martinez and Corral voluntarily consented to accompany the officers to the Hobbs Police Department and to the subsequent searches. As to appellant Martinez' pre-sentence investigation report, we remand with directions that the trial court append a written order of its determination to the report.

AFFIRMED in part; REMANDED in part.

OPINIONS BELOW

TRIAL COURT'S ORAL RULING ON MOTION TO SUPPRESS

[443] . . .

THE COURT: All right, the following will constitute the Court's findings of fact and conclusions of law.

The Court is going to deny the motion regarding the stop and search. The Court finds that the roadblock was random, at random, that they held a minimum of two per week, and I think under the Tenth Circuit authority, that it is appropriate to have a roadblock that serves a [444] purpose, such as it was in this case, which was to check registration and insurance.

And that in the process, that one of the officers detected an odor of marijuana. And under the Tenth Circuit,

that's sufficient to establish probable cause for a search.

The Court further finds that the defendant Martinez -- or I should state that the defendant Corral does have standing to question the stop and search by -- even though he was a passenger in the car, under United States v. Obregon.

The Court further finds that upon the detection of odor, that Mr. Martinez, being the operator of the car, did give permission for the search. That it was reasonable for the policemen to believe that the smell of the marijuana, together with what he considered -- four hundred and twenty-five dollars case, was sufficient for him to be suspicious and establish probable cause for the search.

Regarding the lack of communication, the officer testified that he seemed to have no trouble communicating with Mr.

Corral. And I should state for the record that I do not agree with Ms. Torres. That it's true that Officer Sena did have — perhaps did not read rights form as well as Mrs. Torres would like. [445]

The Court is bi-lingual and the Court previously taught Spanish for two years for the University of Maryland, and I find that his Spanish as sufficiently adequate to communicate with Mr. Corral.

So the Court does not accept Mrs. Torres' evaluation of Mr. Sena's Spanish.

Further, the Court finds that the — because of the weather conditions and because of safety, they asked the defendants to agree to proceed to the Hobbs Police Department where they could conduct a search with a dog, which was more efficient and less inconvenient to them, and the defendants agreed.

That thereupon, the dog did — as Mr. Padilla says, hit on the couch, but it appeared that — at least according to the testimony of Officer Frisk, that it seemed to be trying to get around the corner of the couch.

And also Officer Denton stated that in his view the dog was attempting to get to the boxes. And that also he did — as Mr. Padilla again says, hit on some — a cache of money which was discovered.

So the Court also finds that the search was proper, and also that Mr. Corral knowingly and willingly made that statement that is attributed to him.

I might add that although the rights form was [446] read to him, that also the Government's Exhibit 4, I believe, was presented to Mr. Corral, and that is in Spanish, and I would presume — at least

there's no evidence that he's not incapable of reading Spanish.

So the Court therefore also finds that the statement made by Mr. Corral as voluntarily made.

So the motions to suppress in this cause will be denied.

TRIAL COURT'S ORAL RULING AT SENTENCING

[325] . . .

THE COURT: Well, at that point perhaps the [326] information that you say I should not consider bears some weight, since he had one — almost one and a half million dollars in the other apartment, Mr. Padilla.

MR. PADILLA: That's why I think it's important for the Court not to take that into consideration, because I don't believe —

THE COURT: I said I'm not, but if you address that, this seems to rebut what you're stating and what was produced at trial.

COURT OF APPEALS FOR THE TENTH CIRCUIT'S DENIAL OF REHEARING

NOVEMBER TERM - January 6, 1988

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable William H. Timbers*, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs. No. 86-2362

JOSE RAMON MARTINEZ-FABELA
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing, with suggestion for rehearing en banc, filed in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

s/Robert L. Hoecker, Clerk

* Of the Second Circuit, sitting by designation.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fourth Amendment of the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The due process clause of the fifth amendment of the Constitution of the United States provides that no person shall "be deprived of life, liberty, or property, without due process of law . . ."

The impartial jury clause of the sixth amendment provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

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18 U.S.C. sec. 3577, now sec. 3661:

No limitation shall be placed on the information concerning the background, character, and conduct of a person con-

victed of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Fed R. Crim. P. 24(a):

The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Fed. R. Crim. P. 32(c)(3)(D):

If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, (i) make a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter

made available to the Bureau of Prisons [or the Parole Commission].

[The bracketed language was in the rule at the time of sentencing. It was deleted, effective November 1, 1987, by the Sentencing Reform Act of 1984.]

Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1494

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSE RAMON MARTINEZ-FABELA AND ISMAEL CORRAL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether stopping all vehicles at a roadblock set up to check drivers' licenses violates the Fourth Amendment.

2. Whether the search of petitioners' truck was supported by probable cause and consent.

3. Whether the trial court was required to question each potential juror individually about pretrial publicity.

4. Whether the trial court sentenced petitioner Martinez-Fabela on the basis of unreliable information in the presentence report.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1494

JOSE RAMON MARTINEZ-FABELA AND ISMAEL CORRAL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 823 F.2d 1389.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987. A petition for rehearing was denied on January 6, 1988 (Pet. App. 21-22). The petition for a writ of certiorari was filed on March 7, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioners Martinez-Fabela and Corral were convicted of possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. 2). Martinez-Fabela

was sentenced to 15 years' imprisonment, and Corral was sentenced to 10 years' imprisonment (Pet. 22).

1. On April 17, 1986, New Mexico State Police officers Norman Denton and Clifford Frisk set up a roadblock on a state highway near Hobbs, New Mexico, to check drivers' licenses, registrations, and car insurance (Pet. App. 4).[1] In accordance with standard procedure, Officers Denton and Frisk sought and received permission from their supervising officer to establish the roadblock (*ibid.*). The officers parked their patrol cars facing west in the eastbound lane, and they placed a stop sign in the middle of the road. The officers stopped all eastbound traffic, with the exception of the delivery trucks from a local supermarket (*ibid.*). The officers did not stop the supermarket trucks because they knew from a previous roadblock that the drivers of those trucks had all the required logbooks, cab cards, and insurance papers (*ibid.*). The officers stopped all other vehicles at the roadblock and asked the drivers for their licenses (*ibid.*).

2. Petitioner Martinez-Fabela, who was driving a rented truck with petitioner Corral as his passenger, was stopped at the roadblock (Pet. App. 4). As Martinez-Fabela rolled down his window, Officer Denton smelled the odor of marijuana in the truck (*ibid.*). Officer Denton asked Martinez-Fabela for his driver's license and the truck rental agreement; Martinez-Fabela complied and also showed the officer an expired National Guard identification card (*ibid.*). Martinez-Fabela said that he and Corral were on their way to Atlanta to deliver furniture (*id.* at 4-5).

To determine whether Martinez-Fabela or Corral had more marijuana with them, Officer Denton asked Martinez-Fabela to pull the truck over to the side of the

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[1] Petitioners suggest (Pet. 6) that "drug detection" was the true purpose of the roadblock. As the court of appeals recognized (Pet. App. 8-9), however, the record does not support their contention.

road (Pet. App. 5). Martinez-Fabela and Corral got out of the truck, and Officer Frisk joined them. After Officer Denton told Officer Frisk why he had requested Martinez-Fabela to pull the truck over, Officer Frisk asked Martinez-Fabela for permission to look in the cargo compartment of the truck (*ibid.*). Martinez-Fabela gave his permission, and Officer Frisk began a search (*ibid.*). Officer Denton then asked Corral whether he had been smoking marijuana; Corral admitted that he had (*ibid.*). Officer Denton asked Corral for permission to look inside a suitcase that was behind a seat in the truck. Corral agreed, and the search disclosed $1,000 in $20 bills (*id.* at 6).

The officers then decided to search thoroughly the contents of the truck (Pet. App. 6). Because it was very windy, Officer Denton offered petitioners a choice between unloading the truck at the side of the road or going to a police station in Hobbs to permit a drug-detecting dog to sniff the contents of the truck (*id.* at 6-7). Petitioners chose to accompany the officers to the police station. At the station, Martinez-Fabela signed a consent-to-search form to corroborate his earlier oral consent (*id.* at 7). The drug-detecting dog then entered the truck and tried to reach some cardboard boxes that were packed underneath some furniture. The officers opened the boxes, discovered approximately 474 pounds of cocaine, and arrested Martinez-Fabela and Corral (*ibid.*).

3. The district court denied petitioners' motion to suppress the cocaine. The district court held that the roadblock was constitutional (Pet. App. 16), that the officers had probable cause to search the truck (*id.* at 16-17), and that petitioners consented to the search at the police station (*id.* at 18).

The court of appeals affirmed. In holding that the roadblock was constitutional, the court noted that it "was

established in a systematic manner to stop vehicles in a pattern which protected the public from the officers' unbridled discretion" (Pet. App. 9). The court of appeals also held that the officers had probable cause to search the truck and that petitioners voluntarily consented to the search (*id.* at 11-14). Finally, the court of appeals rejected Martinez-Fabela's contentions that the district court erred by not asking prospective jurors individually about pretrial publicity (*id.* at 3 n.1) and by considering unreliable information in the presentence report (*id.* at 14).

ARGUMENT

1. Petitioners renew their contention (Pet. 22-30) that the roadblock set up by the New Mexico State Police violated the Fourth Amendment. That argument is meritless.

The Court in *Delaware* v. *Prouse,* 440 U.S. 648 (1979), approved the type of roadblock used in this case. In *Prouse,* the Court held that the police may not randomly stop vehicles without reasonable suspicion. The Court noted, however, that the police are free to develop "methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative" (*id.* at 663 (footnote omitted)).

Here, the officers set up the roadblock to check licenses, registrations, and insurance. The officers stopped all vehicles at the roadblock except for trucks from a particular supermarket; thus, they did not exercise individual discretion in determining whom to stop. Moreover, the role of the officers at the roadblock was very limited. They asked each driver for his license, registration, and proof of insurance, all of which a driver must possess under state

law.[2] Because the roadblock in this case was limited, routine, and related to valid public interests, it satisfied the standard set forth by this Court in *Prouse*. As the Court noted in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560-561 n.14 (1976), the practice of stopping automobiles briefly to check compliance with motor-use regulations "is accepted by motorists as incident to highway use."[3]

2. Petitioners also contend (Pet. 36-39) that the state police officers had no authority to search their truck. That contention is wrong because the search was supported by both probable cause and petitioners' consent.

The courts of appeals agree that the presence of marijuana smoke or other evidence of personal drug use in the passenger compartment of a vehicle establishes probable cause to believe that drugs are concealed in other parts of the vehicle. See *United States* v. *Loucks*, 806 F.2d 208, 209 (10th Cir. 1986); *United States* v. *Burnett*, 791 F.2d 64, 65, 66-67 (6th Cir. 1986); *United States* v. *Alderete*, 546 F.2d 68, 69 (5th Cir. 1977).[4] Accordingly, Officer Denton's detection of marijuana odor gave him probable cause to search petitioners' truck.

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[2] See N.M. Stat. Ann. §§ 66-3-13 (registration), 66-5-16 (license), 66-5-229(C) (proof of insurance) (1978 & Supp. 1987).

[3] Petitioners cite (Pet. 30-36) a series of state court decisions discussing roadblocks used for enforcement of drunk-driving laws. Those roadblocks required field officers to use their discretion in stopping vehicles or their subjective judgment in determining the sobriety of drivers. In contrast, a check for drivers' licenses does not involve the officers' subjective judgment, and the officers in this case stopped all unfamiliar vehicles without exception. The type of roadblock established in this case was therefore much less likely to result in an abuse of discretion. See *Delaware* v. *Prouse*, 440 U.S. at 657.

[4] Petitioner cites (Pet. 39) several state cases that distinguish between searches of the passenger compartment of a car or van and

In addition, petitioners consented to the search of the cargo compartment of their truck. Officer Frisk asked Martinez-Fabela for permission to look in the back of the truck, and Martinez-Fabela consented (Pet. App. 5). Likewise, Officer Denton received Corral's consent to look inside the truck (*id.* at 6). The officers could have immediately opened the cardboard boxes in the truck. But the officers gave petitioners the option of having the truck searched with the help of a drug-sniffing dog at a nearby police station. Petitioners elected that option.

Petitioners contend (Pet. 47) that their consent was invalid because Martinez-Fabela did not sign a consent form until about an hour and a half after the initial stop. The timing of the signing of the consent form, however, does not undermine the voluntariness of the consent. The form was signed long after the consent was given because the consent form was produced only after the truck was taken to the police station in accordance with petitioners' choice to have the search conducted there rather than alongside the highway.

3. Petitioners also assert (Pet. 49-51) that the district court erred by not asking each prospective juror individually about the effect of pretrial publicity. The court

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searches of the trunk or storage area based on evidence of marijuana use in the passenger compartment. See *Burkett* v. *State*, 271 Ark. 150, 607 S.W.2d 399 (1980); *Wimberly* v. *Superior Court*, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976); *State* v. *Walker*, 93 N.M. 769, 605 P.2d 1168 (1980). These cases all predate this Court's decision in *United States* v. *Ross*, 456 U.S. 798 (1982), where the Court held that if probable cause justifies the search of a lawfully stopped vehicle, "it justifies the search of every part of the vehicle and its contents that may conceal the object of the search" (*id.* at 825). Having probable cause to believe that the truck contained marijuana, the officers were therefore justified in examining not only the passenger compartment of the truck, but the cargo area as well.

of appeals, however, properly held that the district court did not abuse its discretion in that regard.

Federal Rule of Criminal Procedure 24(a) gives a district court broad discretion to determine the scope and method of voir dire; that discretion includes whether jurors should be questioned collectively or individually. See *United States* v. *Colacurcio*, 659 F.2d 684, 689 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982). Individual examination of prospective jurors is not required when the defendant makes only unsupported allegations of prejudicial pretrial publicity or when the publicity does not create a significant potential for prejudice. See, *e.g.*, *United States* v. *Colacurcio*, 659 F.2d at 689; *United States* v. *Mayo*, 646 F.2d 369, 373-374 (9th Cir.), cert. denied, 454 U.S. 1127 (1981). Here, petitioners offered nothing more than general allegations of pretrial publicity. In his motion for individual questioning (at 2), Martinez stated that there was "extensive pre-trial publicity," and during the voir dire Corral asserted that the case "generated a lot of publicity at the time that the defendants were arrested and the seizure was made, which necessarily resulted in a lot of newspaper coverage and matters like that" (6/2/86 Tr. 18). Petitioners, however, submitted no evidence or documentation to support their claims. The district court, therefore, did not abuse its discretion by not questioning each prospective juror individually.[5]

4. Lastly, Martinez-Fabela contends (Pet. 51) that the district court violated his right to due process because the court allegedly used unreliable information at Martinez-Fabela's sentencing hearing. The record does not support that claim.

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[5] Each of the cases that petitioners cite as calling for individual questioning (Pet. App. 49-51) involved significant pretrial publicity of the kind not shown by petitioners to be present here.

At the sentencing hearing, Martinez-Fabela challenged the statements in his presentence report that he possessed substantial amounts of cocaine and that large amounts of money had been found in his apartment. The district court stated on the record, pursuant to Fed. R. Crim. P. 32(c)(3)(D), that it did not consider those allegations in imposing sentence (Pet. App. 14). Although the district court later mentioned that information in discussing Martinez-Fabela's financial assets, the court was clear that it was not considering that information as bearing on Martinez-Fabela's sentence (8/29/86 Tr. 326). And, contrary to the assertion in the petition (at 51), the district court never stated that it was conditioning its "non-consideration" of the presentence statements on Martinez-Fabela's not presenting any evidence in mitigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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